80-2075

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATHANIEL COLEMAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A. RICHARD GERBER, ESQUIRE
Counsel for Petitioner
Suite 500
One Montgomery Plaza
Norristown, Pennsylvania 19401
(215) 279-6700

Of Counsel:

GERBER, GERBER & SHIELDS
Attorneys
Suite 500
One Montgomery Plaza
Norristown, Pennsylvania 19401
(215) 279-6700

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QUESTIONS PRESENTED

1. (a) Whether the due process clause of the Fourteenth Amendment prohibits the government's use at trial of a tape recording containing incriminating statements attributed to the Petitioner and solicited by a government informant equipped by the government with a recording device, in the absence of direct evidence at trial other than the testimony of a government agent that the informant gave his uncoerced consent to the interception of his alleged conversation with the Petitioner, and (b) whether the due process clause of the Fourteenth Amendment prohibits the government's use at trial of an intercepted tape recording of incriminating statements attributed to the Petitioner, together with statements totally irrelevant to the issues at trial, but which were highly and unfairly prejudicial to the Petitioner.

2. Whether the due process clause of the Fourteenth Amendment prohibits the conviction of the Petitioner for his mere presence in the company of one found to be in possession of contraband who, at a later time and at another location, allegedly transferred the contraband to a government agent.

3. Whether the due process clause of the Fourteenth Amendment prohibits a trial judge from instructing a criminal jury that in reaching a verdict it may build a "personal character analysis" of the Defendant from the evidence offered by the government on one charge and apply that "analysis" as substantive evidence of the Defendant's guilt with respect to a separate and distinct charge.

4. Whether the statements of an alleged co-conspirator were admissible against the Petitioner in the absence of proof *aliunde* that a conspiracy involving the Petitioner and the declarant existed at the time that the statements were made and that the statements were made in furtherance of the conspiracy.

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IN THE

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No.

NATHANIEL COLEMAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, NATHANIEL COLEMAN, respectfully prays that a Writ of Certiorari issue to review the Judgment & Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 18, 1981. The Respondent is the United States of America.

OPINION BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, dated March 18, 1981, appears in Appendix A hereto. The Order of the United States Court of Appeals for the Third Circuit Sur Petition for Rehearing, dated April 9, 1981, appears in Appendix B hereto. Neither the United States Court of Appeals for the Third Circuit nor the United States District Court for the Eastern District of Pennsylvania filed Opinions in this proceeding.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on March 18, 1981. The Order of the

Court of Appeals for the Third Circuit Sur Petition for Rehearing was entered on April 9, 1981. This Petition for Writ of Certiorari was filed within sixty (60) days of the date of the final Order Sur Petition for Rehearing. This Honorable Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution, sections 2511 and 2515 of Title 18 of the United States Code, and Rules 403, 404, 801 and 802 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

On June 4, 1980, the Petitioner was convicted by a jury in the United States District Court for the Eastern District of Pennsylvania, the Honorable Clarence C. Newcomer, presiding, of two counts of distributing heroin. On July 11, 1980, the Petitioner's Motion for a New Trial and/or a Judgment of Acquittal was denied by the trial court and a sentence imposed of four years imprisonment, to be followed by a consecutive five years of special parole and a consecutive five years probation.

The charges against Petitioner arose out of the alleged transfer of heroin on September 7, 1979 from the Petitioner to one Cynthia Holloman, who allegedly subsequently transferred the alleged heroin to an agent of the United States Drug Enforcement Administration (Count I of the Bill of Indictment), and the alleged transfer of heroin from the Petitioner to a heroin dealer and addict, government informant Nigel Anderson, on October 12, 1979 (Count IV of the Bill of Indictment).

On July 18, 1980, the Petitioner perfected an Appeal from the Judgment of Sentence to the United States Court of Appeals for the Third Circuit.

In a Judgment Order dated March 18, 1981, the United States Court of Appeals for the Third Circuit (Seitz, *Chief Judge*, and Van Dusen and Gibbons, *Circuit Judges*) affirmed the Judgment of the United States District Court for the Eastern District of Pennsylvania. In an Order dated April 9, 1981, the Petitioner's Petition for Rehearing was denied by the United States Court of Appeals for the Third Circuit.

Neither the District Court nor the Court of Appeals filed an Opinion in support of its judgment nor in any other way set forth statutory or judicial authority in support of its decisions or in response to the Petitioner's assignments of error.

The following additional facts are submitted in support of the Petitioner's questions presented for review.

The Petitioner's conviction of Count I of the Bill of Indictment, concerning the alleged transfer of heroin from the Petitioner to Cynthia Holloman on September 7, 1979, was based upon hearsay testimony offered by government agents over the objection of the Petitioner.

At approximately 12:25 p.m. on September 7, 1979, Stephen Hopson, an agent of the U.S. Drug Enforcement Administration (DEA), while conducting surveillance of the residence of one Cynthia Holloman, observed Miss Holloman leaving her residence and entering a 1977 Chevrolet Monte Carlo automobile being driven by an unidentified white male. Miss Holloman and the male then proceeded to the Roma Bar where she was met by DEA agents, including Gerome Harris, and a "cooperating

individual" (informant), who, Agent Harris testified, introduced Miss Holloman to him as a drug dealer interested in purchasing ten bundles of heroin. Agent Harris further testified that after a brief conversation he had with Miss Holloman, he and his informant entered one vehicle and Miss Holloman returned to the Chevrolet Monte Carlo which continued to be occupied by the unidentified white male.

Mr. Harris further testified that the two vehicles then rendezvoused at an intersection where Miss Holloman and Agent Harris each left their cars and met on a street-corner. Agent Harris testified that he then negotiated with Miss Holloman for the purchase of heroin and agreed to pay $300 in advance before she obtained the heroin from her supplier and to pay an additional $300 upon the delivery of the heroin.

Agent Hopson testified that he observed Mr. Coleman sitting in a car approximately one-quarter block away from the intersection where Agent Harris and Miss Holloman met. Agent Harris testified that Miss Holloman told him that the white male driving the Chevrolet Monte Carlo was not her "cop" (supplier), and that Miss Holloman then pointed to the car in which Mr. Coleman was seated and indicated that her "man" was waiting for her and that he was watching the transaction. Agent Harris further testified that after Miss Holloman received $300 from him, she approached the vehicle occupied by Mr. Coleman and said, "I got the money." Agent Harris testified that Miss Holloman entered the car and they drove away.

Agent Hopson then testified that approximately fifteen minutes later, Miss Holloman and Mr. Coleman returned, and that before Miss Holloman exited the Cadillac, he observed Mr. Coleman pass several items to Miss Holloman, items that appeared to be similar to the five bundles of heroin introduced by the government as Exhibit G-1. None of the other agents present testified to this.

Agent Hopson further testified that Miss Holloman entered the Chevrolet Monte Carlo and she and the unidentified white male drove to her residence. Agent Harris testified that he and Miss Holloman entered her apartment, which was occupied by three individuals. Agent Harris testified that he and Miss Holloman entered a bedroom where she removed five bundles of heroin from her pocketbook and gave it to him. This pocketbook had been in Miss Holloman's exclusive control during the entire transaction, and it was never searched by the government agent prior to, during, or after the transaction. Agent Harris further testified that prior to the delivery of the heroin to him by Miss Holloman she was alone with the unidentified white male in the Chevrolet Monte Carlo and with at least the three persons who were in her apartment when he arrived there.

Cynthia Holloman never testified at trial. All of her alleged statements were recited by DEA agents over objection by defense counsel.

With respect to Count IV of the Bill of Indictment, the government offered evidence that on October 12, 1979, the Petitioner transferred heroin to Nigel Anderson, a drug dealer and drug addict hired by the government to act as informant and upon whose person the government agents had installed a NAGRA recording device by which the government sought to record the details of the alleged transfer. Nigel Anderson, having died prior to trial, was unavailable to testify at trial. Nevertheless, the Court, over the Petitioner's objection, permitted the government to introduce the tape recording of the alleged conversation between the Petitioner and Nigel Anderson in spite of the fact that the government failed to introduce direct evidence that Nigel Anderson, an individual known by the government to be a drug dealer and drug addict, had knowingly, intelligently, voluntarily and without coercion by the government, consented to the installa-

tion of the NAGRA recording device upon his person and consented to have his alleged conversations with the Petitioner intercepted by the government. In addition, the Court below refused to redact portions of the tape recording which were highly and unfairly prejudicial to the Petitioner, as well as being totally without probative value.

After the jury had retired to deliberate, the trial judge received a written communication from the jury which he read and answered in the presence of the jury as follows:

> The Court: Members of the jury, I have received another written communication from you in which you have stated as follows:
>
> > "In deciding on the verdict for the first Indictment"—and by that I assume you mean for Count I of the Indictment—"in building our personal character analysis of Nathaniel Coleman can we use evidence brought out in testimony involving the October 12, 1979, case."
>
> The answer is yes.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. THE COURT FAILED TO REQUIRE PROOF THAT THE RECORDING OF DEFENDANT'S CONVERSATION WAS LAWFUL UNDER 18 U.S.C. § 2511.

The decisions of this Court have made plain that tape recorded conversations may be used at trial only if their interception is lawful under 18 U.S.C. § 2511. Section 2511 makes interception unlawful except when certain requirement are met including, *inter alia*, when one party to the intercepted conversation consents to the interception. In the absence of proof of consent, the evidence must be excluded.

In *Gelbard v. United States*, 408 U.S. 41 (1972), this Court reversed and remanded a contempt conviction on the basis that evidence was introduced which should have been excluded pursuant to the provisions of Section 2515 of Title 18 of the United States Code. In so holding, this Court stated that

> § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also "to protect the integrity of the Court in administrative proceedings." 408 U.S. at 51 (footnote omitted).

The decision below is in conflict with the reasoning of this Court in *Gelbard*. The government, having chosen to use a drug dealer and drug addict for the purpose of obtaining incriminating statements from the Petitioner, had the burden of demonstrating at trial that its informant had given his prior consent to the interception of his conversation with the Petitioner and that his consent was not the result of coercion or undue pressure on the part of government agents. The lower court violated these criteria in permitting the government to use the tape recordings of the conversation to which the Petitioner was a party without requiring an independent showing that the government's informant had not been pressured by the government or induced with promises of lenience which would only be honored if he consented to the interception of his conversation with the Petitioner and that the informant was not the subject of threats or other coercive inducements to cooperate with the government.

The action of the court below stands in marked contrast to the standard set by lower courts in that circuit and in other circuits for the introduction of intercepted communications as evidence at trial. For example, in *United States v. Laughlin*, 222 F.Supp. 264 (D.D.C. 1963), *aff'd*, 474 F.2d 444 (D.C. Cir. 1972), *cert. denied*,

412 U.S. 941 (1973), the United States District Court for the District of Columbia held that because the government's informant felt that he had to cooperate with the government under an implied threat of indictment if he failed to cooperate, his consent to the interception of his conversation was vitiated and ineffective. Similarly, in *United States v. Osser*, 483 F.2d 727 (3d Cir.), *cert. denied*, 414 U.S. 1028 (1973), the court, although finding the consent of the government's informant valid, held that a Court of Appeals should inquire into whether the consent relied upon by the government "was voluntary and uncoerced." *Id.* at 730.

In contrast to *Osser*, where the informant testified that he did not feel pressured by the government and where nothing in the record before the court demonstrated that his promise of immunity would not be honored regardless of whether he consented to the interception of his conversation, there is no such unequivocal evidence in this case. Nigel Anderson did not testify concerning the circumstances surrounding the interception of his conversation, and there is no indication that he was not pressured by the government into cooperating. The only testimony relating to Nigel Anderson's consent is the uncorroborated testimony of an agent that Anderson said he was not being pressured and not being coerced. This evidence is uncorroborated by the other government witnesses present at the site of the installation of the recording device and uncorroborated by the two surveillance reports filed by the government in connection with the interception. Thus, the court below failed to apply the standards applied by the courts in both *Osser* and *Laughlin* in permitting recording device evidence to be int duced without proof of the legality of the interception. This departure justifies review by this Court.

The decision below is also in conflict with this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949),

in which this Court held that evidence in criminal trials must be "strictly relevant to the particular offense charged." 337 U.S. at 247.

The Court, in *Williams* and other cases, has consistently held that the admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction even though there was sufficient relevant evidence to sustain the verdict. During the course of trial in this case, the trial judge refused defendant's request that portions of the tape recording of the alleged conversation between the Petitioner and Nigel Anderson be redacted, specifically that portion of the recording in which the following statement is attributed to the Petitioner:

> I don't know, I couldn't see it was (unintelligible) . . . I just knew the car. If I catch that mother fucker out of town Jack . . . it's party time for his mother fucking ass.

It is evident that this statement attributed to the Petitioner was highly and unfairly prejudicial to the Petitioner, as well as being totally without probative value. The Petitioner's inclination to inflict injury upon a third, unidentified party is obviously irrelevant to the charges for which he was being tried and had the tendency to prejudice the jury in their evaluation of the evidence offered by the government in support of Count IV of the Indictment. This prejudice had a clearly infectious effect upon the evidence offered by the government in support of Count I of the Indictment, as the trial judge had instructed the jury that in reaching their verdict on Count I of the Indictment and "in building [their] personal character analysis of Nathaniel Coleman," the jury was permitted to use the evidence offered by the government in support of Count IV, including, by necessary implication, the above-quoted statement attributed to the Petitioner. It is clear that the admission of the quoted statement significantly and unfairly prejudiced

the jury with respect to its consideration of both Counts I and IV and undoubtedly confused the jury both with respect to their function and with respect to the focus of their deliberations. This Court has specifically held that it is irrelevant to this issue that the government may have had sufficient relevant evidence to convict the Petitioner of either or both Counts of the Indictment on which he was tried.

II. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE ISSUE OF THE EVIDENTIARY EFFECT OF A CRIMINAL DEFENDANT'S MERE PRESENCE AT THE SCENE OF A CRIME.

This Court and several Circuit Courts of Appeal have consistently held that mere presence at the scene of a crime does not itself give rise to an inference concerning possession of or dominance over narcotics. *United States v. Salinas-Salinas*, 555 F.2d 470, 473 (5th Cir. 1977). Nor does mere presence at the scene where narcotics are transferred or possessed give rise to an inference as to possession or delivery of narcotics. *Araujo-Lopez v. United States*, 405 F.2d 466, 467 (9th Cir. 1969). Nor is knowledge of the physical presence of contraband a sufficient basis for conviction. *Amaya v. United States*, 373 F.2d 197, 199 (10th Cir. 1967). Moreover, a criminal defendant's mere association with a person or persons having possession or control of narcotics, or his mere presence on property where narcotics are found, form an insufficient basis for a determination that the defendant was in possession of narcotics. *Bass v. United States*, 326 F.2d 884, 886 (8th Cir.), *cert. denied*, 377 U.S. 905 (1964). *See also United States v. Baker*, 499 F.2d 845, 848 (7th Cir.), *cert. denied*, 419 U.S. 1071 (1974). In fact, the decision below conflicts with decisions of the United States Court of Appeals for the Third Circuit. *See United States v. Bonham*, 477 F.2d 1137 (3d Cir. 1973).

The conflict between the decision below and the decisions of other Circuit Courts and, in fact, prior decisions of the United States Court of Appeals for the Third Circuit, justifies review of this case by this Court. At trial in the lower court, the government failed to prove by any demonstrable evidence that the heroin transferred by Miss Holloman to a government agent on September 7, 1979 was not, in fact: (1) in Miss Holloman's exclusive possession from the time of her first meeting with DEA Agent Gerome Harris at a bar on September 7, 1979; (2) in the possession of the unidentified white male driving the Chevrolet Monte Carlo automobile used to transport Miss Holloman; (3) in the Chevrolet Monte Carlo automobile; (4) in the possession of one or more of the individuals in Miss Holloman's apartment at the time that she arrived and subsequently transferred to Miss Holloman and then to Agent Harris; (5) in Miss Holloman's apartment during the entire transaction prior to being obtained by Miss Holloman.

More importantly, the government introduced no evidence at trial that would justify the jury in concluding that the Petitioner was at any time in possession, either actual or constructive possession, of heroin, on September 7, 1979 or at any other time. Nor did the government introduce any evidence at trial which would justify the jury in concluding that the Petitioner in any way participated in a transfer of heroin on September 7, 1979.

The Court below, in ignoring its own prior decisions and prior decisions of other Circuit Courts of Appeal on the issue of possession, denied the Petitioner due process of law and equal protection of the laws. The Third Circuit's decision should be reviewed by this Court not only to preserve the Petitioner's constitutionally guaranteed protections, but to insure a uniformity of application of decisional law concerning the issue of possession throughout the Circuits of the United States.

III. THE COURT BELOW WRONGLY INSTRUCTED THE JURY THAT IT COULD CONSIDER IRRELEVANT AND UNRELATED CHARACTER EVIDENCE TO CONVICT DEFENDANT IN CONFLICT WITH THIS COURT'S DECISION IN *MICHELSON v. UNITED STATES* AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *UNITED STATES v. BEECHUM*.

The trial judge's erroneous instruction to the jury in response to its question permitted the jury to build a character analysis of the defendant based on testimony about an unrelated offense and use that analysis to convict defendant of the charged offense. This action was inconsistent with the decision of this Court in *Michelson v. United States*, 335 U.S. 469 (1948), and the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Beechum*, 582 F.2d 898 (1978), *cert. denied*, 440 U.S. 920 (1979), and was extremely prejudicial to defendant.

In *Michelson v. United States*, this Court held:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them

> as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. 355 U.S. at 475-76 (footnotes omitted).

In *United States v. Beechum*, *supra*, the Court of Appeals for the Fifth Circuit enunciated the two-step test of relevancy established by Federal Rule of Evidence 404(b):

> What the rule calls for is essentially a two-step test. First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403. 582 F.2d at 911 (footnote and citation omitted).

The instruction of the trial judge, which was apparently approved on appeal by the Third Circuit, essentially permitted the jury to use irrelevant extrinsic evidence of the defendant's character to establish the probability of his guilt of an unrelated and totally separate crime. The instruction of the trial judge denied the Petitioner due process of law since the undue prejudice caused by the instruction was a substantial factor in the jury's verdict. This prejudicial answer was the last piece of information and instruction given to the jury. The instruction essentially permitted the jury to supplement the evidence offered by the government in support of the Two Counts of the Bill of Indictment of which the Petitioner was subsequently convicted with the prejudicial extrinsic evidence offered in support of the counts for which defendant was acquitted. The jury's question illustrated its in-

ability to reach a verdict against defendant based solely on the evidence that was before it on each count. The judge's response to the jury's question gave the jury license to convict the defendant of being a "bad person" rather than requiring the jury to convict or acquit the defendant on the charges in the indictment. This improper use of prejudicial evidence deprived defendant of a fair trial.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN THE CASE OF *GLASSER v. UNITED STATES* AND WITH DECISIONS OF SEVERAL UNITED STATES COURTS OF APPEAL.

The decision of the trial judge to permit the testimony of DEA agents concerning extra-judicial statements attributed to one Cynthia Holloman and introduced by the government in support of Count I of the Bill of Indictment significantly conflicted with this Court's decision in the case of *Glasser v. United States*, 315 U.S. 60 (1942), and with the decisions of several United States Courts of Appeal. That conflict should provide independent justification for review by this Court.

The only relevant exception to the hearsay rule set forth in Rule 802 of the Federal Rules of Evidence is the "co-conspirator exception" set forth in Rule 801 (d) (2) (E) which provides that a statement made by a co-conspirator during the course of and furtherance of the conspiracy is not hearsay.

In interpreting the exception set forth in Rule 801 (d) (2) (E), the Third Circuit held:

> To determine whether the evidence is competent against the nondeclarant, the trial judge determines whether it has been proved, by a preponderance of the evidence, that a joint undertaking existed at the time of the statement or action. *United States v.*

> *Gleaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). No lesser burden of proof would be satisfactory since the defendant does not have the opportunity to cross-examine the declarant. *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

In *United States v. Di Rodio*, 565 F.2d 573 (9th Cir. 1977), the Court of Appeals for the Ninth Circuit held:

> To be admissible the statement [of a co-conspirator] must be in furtherance of the conspiracy and be made during the pendency of the criminal scheme. Further, the existence of the conspiracy as well as the connection of the defendant and declarant with it must be proved independently. *United States v. Testa*, 548 F.2d 847 (9th Cir. 1977); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977). *Id.* at 575.

These decisions, unlike the decision in the court below, are consistent with this Court's decision in the case of *Glasser v. United States*, *supra*, in which this Court held that in order for the statement of a declarant to be admissible in trial against his or her co-conspirator, the government must prove by evidence independent of the hearsay, or, by proof *aliunde*, that a conspiracy in fact existed and that the statement of the declarant was made during the pendency of and in furtherance of that conspiracy. *See also United States v. Heckman*, 479 F.2d 726 (3d Cir. 1973); *United States v. Jones*, 542 F.2d 186 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

It is respectfully submitted that the government was not required by the Court below to meet its burden of proof by independent evidence, that is, by evidence independent of the hearsay statements of Cynthia Holloman, that Cynthia Holloman and the Petitioner were involved in a conspiracy and that the statements of Cynthia Hollo-

man introduced into evidence through agents of the Drug Enforcement Administration were made during the pendency of and in furtherance of a conspiracy. This decision effectively denied the Petitioner due process of law and equal protection of the laws and conflicted significantly with prior decisions of this Court, prior decisions of the United States Court of Appeals for the Third Circuit, and prior decisions of several other United States Courts of Appeal. As set forth above, the decision of the Court below should be reviewed by this Court not only to preserve the Petitioner's constitutionally guaranteed protections, but to insure uniformity throughout the Circuits of their application of decisional law concerning the issue of conspiracy and the use at trial of extra-judicial statements of alleged co-conspirators.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

A. RICHARD GERBER, ESQUIRE
Counsel for Petitioner
Suite 500
One Montgomery Plaza
Norristown, Pennsylvania 19401
(215) 279-6700
I.D. No. 09400

Of Counsel:
GERBER, GERBER & SHIELDS
Attorneys
Suite 500
One Montgomery Plaza
Norristown, Pennsylvania 19401
(215) 279-6700

Dated:

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2148

UNITED STATES OF AMERICA
NATHANIEL COLEMAN,
Appellant

(Criminal No. 80-00107-01—E.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
March 16, 1981

BEFORE: SEITZ, *Chief Judge*, VAN DUSEN and GIBBONS, *Circuit Judges*.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the verdict in the court below was contrary to the law, the evidence and the weight of the evidence, (2) the learned trial judge erred in admitting, over objection, a tape recording of a conversation between Nathaniel Coleman and government informant Nigel Anderson, (3) the learned trial judge erred in refusing to redact portions of a tape recording of a conversation between Nathaniel Coleman and a government informant which were irrelevant to the issues at trial and highly and unfairly prejudicial to Nathaniel Coleman, (4) the learned trial judge erred in admitting, over objection, testimony of a government agent concerning extra-judicial statements allegedly made by one Cynthia Hollo-

man, an individual not a party to the litigation, and (5) the learned trial judge erred in instructing the jury that in reaching their verdict on Count I of the Bill of Indictment and in building (their) personal character analysis of Mr. Coleman they could consider the testimony presented by the government in support of Count IV of the Bill of Indictment, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ SEITZ
Chief Judge
ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

Dated: Mar. 18, 1981

Certified as a true copy and issued in lieu of a formal mandate on April 17, 1981.

[COPY]

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2148

UNITED STATES OF AMERICA

v.

NATHANIEL COLEMAN,

Appellant

(Criminal No. 80-00107-01—E.D. of Pa.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: April 9, 1981

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2511 of Title 18 of the United States Code provides in relevant part:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> > (a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.
> >
> > . . . .
>
> (2) (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Section 2515 of Title 18 of the United States Code provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 of the Federal Rules of Evidence provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> > (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
> >
> > (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides:

(d) Statements which are not hearsay. A statement is not hearsay if . . . (2) the statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802 of the Federal Rules of Evidence provides:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.